Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1976

No. 76-836

LEWIS JASPER THOMPSON,
Appellant,

v.

COMMONWEALTH OF VIRGINIA,
Appellee.

On Appeal from the Supreme Court of Virginia

MOTION TO AFFIRM THE JUDGMENT OF THE SUPREME COURT OF VIRGINIA

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Richmond, Virginia 23219

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PRELIMINARY STATEMENT

The appellee, Commonwealth of Virginia, respectfully moves this Honorable Court to affirm the judgment of the Supreme Court of Virginia entered on August 26, 1976, affirming the appellant's conviction in the Circuit Court of Chesterfield County, Virginia.

OPINION BELOW

The judgment of the Supreme Court of Virginia is not reported as it was a refusal of a Writ of Error without opinion and is contained in the appendix to the Jurisdictional Statement at page 13.

JURISDICTION

Appellant asserts that the jurisdiction of this Court is conferred by 28 U.S.C. § 1257(2).

QUESTION PRESENTED

Whether the statute in question placed an affirmative burden of proof upon appellant to disprove an element of the offense for which he was convicted.

STATEMENT OF THE CASE

The appellant was tried by the Circuit Court of Chesterfield County, sitting without a jury, on May 2, 1975, on an indictment charging possession of marijuana with the intent to distribute. The appellant was found guilty as charged, and after receiving a presentence report, the trial court fixed punishment at twenty years in the penitentiary with ten years being suspended. The Supreme Court of Virginia denied and refused a petition for a Writ of Error, thus affirming the judgment of the Circuit Court of Chesterfield County.

The evidence at trial established that the appellant had in his possession marijuana with the approximate weight of ninety-eight and one-half pounds (Tr. 216). A set of scales and plastic baggies were also seized along with the marijuana (Tr. 29, 30, 171).

All references are to the trial transcript of May 2, 1975, and designated (Tr. ....).

ARGUMENT

I.

The Virginia Statute In Question Does Not Place The Burden Of Proof Upon Appellant To Disprove An Element Of The Offense Of Which He Was Convicted.

Appellant was tried for a violation of § 54-524.101:1 of the Code of Virginia (1950), as amended. This section was repealed by Chapter 589, [1975] Acts of Assembly 1233, and was recodified as § 18.2-248. Chs. 14, 15, [1975] Acts of Assembly 18, 102. At the time of appellant's conviction the statute in question provided, in pertinent part, as follows:

> § 54-524.101:1. Unlawful acts; penalties.—Except as authorized in this chapter, it shall be unlawful for any person to manufacture, sell, give, distribute or possess with intent to manufacture, sell, give or distribute a controlled substance.
>
> (a) Any person who violates this section with respect to a controlled substance classified in Schedules I, II or III shall upon conviction, be imprisoned for not less than five nor more than forty years and fined not more than twenty-five thousand dollars; any person, upon a second or subsequent conviction of a violation of this section involving an opiate or synthetic opiate drug, may in the discretion of the court or jury imposing the sentence, be sentenced to confinement in the penitentiary for a term of life imprisonment or for any period not less than five years; provided, that if such person prove that he gave, distributed or possessed with intent to give or distribute a controlled substance classified in Schedule I or II other than marijuana only as an accommodation to another individual and not with intent to profit thereby nor to induce the recipient or intended recipient of the controlled substance to use or become addicted to or dependent upon such con-

trolled substance, he shall upon conviction be imprisoned for not less than one nor more than ten years or, in the discretion of the jury or the court trying the case without a jury, by confinement in jail not exceeding twelve months and fined not more than one thousand dollars; and provided further, that if such person prove that he gave, distributed or possessed with intent to give or distribute marijuana or a controlled substance classified in Schedule III only as an accommodation to another individual and not with intent to profit thereby nor to induce the recipient or intended recipient of the controlled substance to use or become addicted to or dependent upon such controlled substance, he shall upon conviction be confined in jail not exceeding twelve months and fined not more than one thousand dollars.

Appellant premises his argument upon this Court's holding in *Mullaney* v. *Wilbur,* 421 U.S. 684 (1975). For the reasons which follow the appellee submits that the questioned statute does not violate *Mullaney*.

The specific language of the statute under attack is the proviso, which appellant contends places the burden of proof upon him to disprove the intent to profit or induce addiction. The Supreme Court of Virginia has previously held that this language merely supplies a rebuttable presumption against accommodation distribution. *Brown* v. *Commonwealth*, 215 Va. 753, 213 S.E.2d 764 (1975). This Court in *Mullaney, supra*, specifically held that the decision did not effect the use of presumptions which require the defendant to produce sufficient evidence to generate a jury issue. *See* 421 U.S. 701, nn.28, 31.

In *Jefferson* v. *Commonwealth*, 214 Va. 432, 201 S.E.2d 749 (1974), the Supreme Court of Virginia ruled in a similar case that there was no burden upon a defendant to prove anything, and that the burden is on the Commonwealth to prove beyond a reasonable doubt every material and necessary element of the criminal offense charged.

The appellee submits that the prior decisions of the Supreme Court of Virginia clearly establish that the questioned statute does not place the burden of persuasion upon the appellant, and that the Virginia Supreme Court decisions are entirely in line with this Court's decision in *Mullaney*.

In his statement of facts, the appellant states that the trial court ruled that the burden was upon him to disprove intent, and not upon the Commonwealth to prove it. The appellee has searched the entire record and is unable to find any such ruling by the trial court.

Contrary to the assertions by appellant that the Supreme Court of Virginia is disregarding this Court's ruling in *Mullaney*, the previously cited cases show unequivocally that the Virginia Supreme Court was applying the principle enunciated in *Mullaney*, prior to this Court issuing that opinion.

As this Court so pointedly noted in *Mullaney*, "the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case." 421 U.S. at 703, 704. In the present case accommodation never became an issue, since there was no evidence introduced either by the Commonwealth or by the appellant which could properly raise this issue.

The appellant was convicted of possession of marijuana with intent to distribute. The Commonwealth introduced evidence to establish that appellant had in his possession marijuana with a weight of approximately 98.5 pounds, a set of scales and plastic baggies. The trial court noted that the baggies would go toward establishing intent to distribute (Tr. 40). In *Hunter* v. *Commonwealth,* 213 Va. 569, 193 S.E.2d 779 (1973), the Virginia Supreme Court made it

abundantly clear that quantity may be considered along with other circumstances to support an inference of intent to distribute and that quantity alone, under certain circumsances, may be sufficient to support an inference of intent to distribute. *See United States* v. *Childs,* 463 F.2d 390 (4th Cir. 1972). This evidence establishes that the Commonwealth proved every element of the offense of which appellant was convicted, and indeed the appellant is not contesting the sufficiency of the evidence.

CONCLUSION

For the foregoing reasons, the appellee submits that this Honorable Court should affirm the judgment of the Supreme Court of Virginia.

Respectfully submitted,

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Attorney General of Virginia

JAMES E. KULP
Assistant Attorney General

Supreme Court Building
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I, James E. Kulp, Assistant Attorney General of Virginia, counsel for the appellee in the captioned matter and a member of the Bar of the Supreme Court of the United States, do hereby certify that on or before the 17th day of December, 1976, I mailed, first class postage prepaid, three copies of the foregoing Motion to Affirm to W. H. C. Venable, Esquire, 1128 Ross Building, Richmond, Virginia 23219, counsel of record for appellant.

JAMES E. KULP
Assistant Attorney General